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No. -

In the Supreme Court of the United States

OCTOBER TERM, 1981

LARRY MIZELL, WARDEN
Vienna Correctional Center,
Petitioner,

vs.

GARY WELSH,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

TYRONE C. FAHNER
Attorney General
State of Illinois

MICHAEL B. WEINSTEIN
DARRELL PANETHIERE
Assistant Attorneys General
188 West Randolph Street
Suite 2200
Chicago, Illinois 60601
(312) 793-2570

RONALD LEE BELL
Assistant Attorney General
Of Counsel.

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QUESTION PRESENTED FOR REVIEW

Whether the court of appeals impermissibly intruded into the realm of state law when it, contrary to all prior authority, interpreted Illinois parole guidelines permitting denial of parole based upon the "seriousness of the offense" in a manner inconsistent with the ex post facto clause of the Constitution, where a prior statute granted Illinois parole authorities unfettered discretion in issuing paroles.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

OPINIONS BELOW

This petition seeks review of the decision of the United States Court of Appeals for the Seventh Circuit which held that the application of the 1973 parole guidelines to a person who committed a crime in 1962, when there existed an unguided parole scheme, contravened the ex post facto clause. *Welsh v. Mizell*, No. 80-1862 (7th Cir. Jan. 12, 1982). (See Appendix A)

On June 21, 1973, after spending more than 10 years in a mental institution, the respondent was convicted of the rape and murder of a three year old girl. Respondent was sentenced to serve 60 to 100 years in a state penitentiary for a crime that took place in September, 1962. *People v. Welsh*, 30 Ill. App. 3d 887, 333 N.E.2d 572 (2d Dist. 1975).

Respondent filed a Petition for Writ of Habeas Corpus with the federal district court in the Southern District of Illinois on March 12, 1980. In his petition he claimed that his constitutional rights under the ex post facto clause were violated in that he was denied parole based upon a criterion (i.e., that his release would deprecate the seriousness of his offense and promote disrespect for the law) which he claims was not in existence at the time he committed his offense.

The district court dismissed the petition on May 22, 1980. A copy of that court's opinion is attached as Appendix B. On January 12, 1982, the court of appeals reversed the judgment of the district court and remanded the case back to the Prisoner Review Board (formerly the Parole and Pardon Board). A copy of that court's opinion is attached as Appendix A. The court of appeals denied the People's petition for rehearing and suggestion for rehearing *en banc* on February 10, 1982. (See Appendix C)

JURISDICTION

The court of appeals' decision was rendered on January 12, 1982. A petition for rehearing was denied February 10, 1982. This petition is being filed within 90 days of the date the court of appeals denied the petition for rehearing as per 28 U.S.C. 2101(c). This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

CONSTITUTIONAL PROVISIONS

Article 1, Section 10, clause 1 of the United States Constitution provides, in pertinent, part, that, "(N)o State shall . . . pass any . . . ex post facto law . . . ."

Amendment X of the United States Constitution provides that:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Article II, § 11 of the Illinois Constitution of 1870 provides that:

> All penalties shall be proportioned to the nature of the offense, and no conviction shall work corruption of blood or forfeiture of estate nor shall any person be transported out of the state for any offense committed within the same.

Article I, § 11 of the Illinois Constitution of 1970 provides that:

> All penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship. No conviction shall work corruption of blood or forfeiture of estate. No person shall be transported out of the State for an offense committed within the State.

Ill. Rev. Stat. 1962, ch. 38, sec. 801 provides, in pertinent part, that:

> § 1. Every person sentenced and committed to the penitentiary shall, in the discretion of the Parole and Pardon Board, be eligible to parole under rules and regulations adopted therefor by the Parole and Pardon Board, such paroles to be as follows: A person sentenced for life may be eligible to parole at the end of 20 years; a person not sentenced for life but sentenced for a definite term of years shall not be eligible to parole until he has served the minimum sentence provided by law for the crime of which he was convicted, good time being allowed as provided by law, not until he has served at least one-third of the time fixed in said definite sentence; a person sentenced for an indeterminate term shall not be eligible for parole until he has served the minimum limit fixed by the court, good time being allowed as provided by law. It shall be deemed and taken as a part of every such sentence, as fully as though written therein, that the Parole and Pardon Board, by and with the approval of the Governor in the nature of a release or commutation of sentence or commitment, may terminate the term of such imprisonment or commitment earlier than the maximum fixed by the court, as provided in Section 9. The provisions of this paragraph shall not apply to persons committed to the Youth Commission pursuant to clause 1 or clause 2 of Section 3.

Ill. Rev. Stat. 1962, ch. 38, sec. 807 provides that:

> The Parole and Pardon Board shall establish rules and regulations not inconsistent with this act, and shall issue paroles in accordance with the provisions

> of this act and of such rules and regulations adopted hereunder.

State of Illinois, Department of Public Safety, Parole and Pardon Board, *Rules and Statutes Relating to Parole and Pardons* (October, 1962; effective June 1, 1962) provides, in pertinent part, that:

> 12. If the members of the Parole and Pardon Board in conference determine that a prisoner serving an indeterminate term is entitled to parole, they shall enter an order for parole. If they determine that a prisoner is not a fit person to serve his sentence outside the penitentiary, parole shall be denied, and such further order entered as in the judgment of the members is warranted.
>
> • • •
>
> 14. In its consideration of the question of whether a prisoner should be paroled, the Parole and Pardon Board shall evaluate all the factors in each case, including the prisoner's conduct record, and grant or deny release on parole in accordance with its judgment.

Ill. Rev. Stat. 1973, ch. 38, § 1003-3-5(c) provides, in pertinent part, that:

> Parole shall be denied if the board finds:
> (1) There is substantial risk that [the prisoner] will not conform to reasonable conditions of parole; or
> (2) his release at that time would deprecate the seriousness of his offense or promote disrespect for the law, or
> (3) his release would have a substantially adverse effect on institutional discipline.

Ill. Rev. Stat. 1973, ch. 38, § 1003-3-5 provides, in pertinent part, that:

> (f) The Board shall render its decision within a reasonable time after hearing, and shall state the basis therefor both in the records of the Board and in written notice to the person on whose application it has acted. In its decision, the Board shall set the person's time for release, or if it denies parole it shall provide for a rehearing not more than twelve months from the date of denial. If the Board shall parole a person, and, if he is not released within 90 days from the effective date of the order granting parole, the matter shall be returned to the Board for review.

Prisoner Review Board Rules Governing Parole 1978, provides, in pertinent part, that:

> V. Basis For Denying Parole
>
> B. Release of the candidate would deprecate the seriousness of the offense or promote disrespect for the law, based on one or more of the following factors:
>
> 1. The offense is one of murder, attempted murder or killing of an individual, robbery with a weapon, rape, indecent liberties, deviate sexual assault, aggravated kidnapping or kidnapping for ransom, armed violence, aggravated arson, treason or calculated criminal drug conspiracy.
>
> 2. The aggravating as well as mitigating circumstances as described in Chapter 38, Sections 1005-5-3.1 and 1005-5-3.2, Illinois Revised Statutes.

STATEMENT OF THE CASE

On January 28, 1962, the respondent was found unfit to stand trial [illegible] the rape and murder of a three year old girl. On June 21, 19[illegible]3, after spending 10 years in mental institutions, respondent was convicted of the aforementioned murder and sentenced by a state court judge to serve 60 to 100 years in a state penitentiary.

In 1979, the Illinois Prisoner Review Board denied parole for a ninth time.[1] The Board stated:

> Parole is denied based upon the extreme seriousness of the crime of murder. The Board believes your release at this time would deprecate the seriousness of the crime and promote disrespect for the law.

Appendix D at 25a.

The parole statute in effect at the time respondent committed the murder stated, in pertinent part, that:

> The Parole and Pardon Board shall establish rules and regulations not inconsistent with this act, and shall issue parole in accordance with the provisions of this act and of such rules and regulations adopted hereunder.

Ill. Rev. Stat. 1962, ch. 38, §807.

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[1] The Illinois Prisoner Review Board succeeded the Illinois Parole and Pardon Board (hereafter "Parole Board" or "Board"). The Board denied parole in a regularly scheduled hearing for a tenth time, on March 9, 1982, while a stay of the 7th Circuit opinion was in effect, based again on the seriousness of the offense. Mr. Welsh is eligible for a parole hearing every year pursuant to Ill. Rev. Stat. 1979, ch. 38, § 1003-3-5(f).

Two pertinent parole regulations enacted by the Parole and Pardon Board are as follows:

> 12. If the members of the Parole and Pardon Board in conference determine that a prisoner serving an indeterminate term is entitled to parole, they shall enter an order for parole. If they determine that a prisoner is not a fit person to serve his sentence outside the penitentiary, parole shall be denied, and such further order entered as in the judgment of the members is warranted.
>
> • • •
>
> 14. In its consideration of the question of whether a prisoner should be paroled, the Parole and Pardon Board shall evaluate all the factors in each case, including the prisoner's conduct record, and grant or deny release on parole in accordance with its judgment.

State of Illinois, Department of Public Safety, Parole and Pardon Board, *Rules and Statutes Relating to Parole and Pardons* (October, 1962; effective June 1, 1962)

In 1973, the Legislature enacted the following parole guidelines:

> Parole shall be denied if the Board finds:
>
> (1) There is substantial risk that [the prisoner] will not conform to reasonable conditions of parole;
>
> (2) *His release at that time would deprecate the seriousness of his offense or promote disrespect for the law; or*
>
> (3) His release would have a substantially adverse effect on institutional discipline.

Ill. Rev. Stat. 1973, ch.38, §1003-3-5(c). (emphasis added)

Respondent filed a Petition for Writ of Habeas Corpus with the federal district court in the Southern District of Illinois on March 12, 1980. In his petition he claimed that the Illinois Parole Board was violating the ex post facto clauses of the United States and Illinois constitutions by denying him parole solely on the basis of a standard that was not in effect in 1962, the year that he committed the crime for which he is incarcerated.

On April 25, 1980, petitioner responded to the petition by filing a motion to dismiss. The district court dismissed the petition on May 22, 1980.(See Appendix B) The district court held that parole was at the discretion of the Parole and Pardon Board in 1961, and was still at the discretion of the Parole and Pardon Board in 1979. According to the district court, the new statute had not impinged on the Board's discretion. The enactment of Section 1003-3-5(c) only served to clarify the Board's decision making process in issuing parole and did not add or subtract from what the Parole and Pardon Board could consider in making its decision. The court concluded "... due to this great discretion given to the Parole and Pardon Board, this Court cannot find that the petitioner was at a substantial disadvantage due to the change in the statute." See Appendix B at 17a.

On January 12, 1982, the court of appeals reversed the district court and remanded the case to the Illinois Prisoner Review Board. *Welsh v. Mizell*, 668 F.2d 328, 332 (7th Cir. 1982) (See Appendix A). The court of appeals held that:

> "The constraints on the Parole Board's discretion in Welsh's case must be those contained in the statute and regulations that were in effect in 1962, not those subsequently enacted." *Id.*

On February 10, 1982, the court of appeals denied the petitioner's petition for rehearing and suggestion for rehearing *en banc*. See Appendix C.

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

I.

THE IMPORTANCE OF THIS CASE REQUIRES REVIEW

The consequence of the Seventh Circuit decision in *Welsh v. Mizell*, 668 F.2d 328 (7th Cir. 1982), is to make the parole statutes at the time a prisoner committed his offense fixed. This would preclude a state from creating guidelines to an unguided parole scheme that would merely rationalize parole denials where no reasons were previously given.

The parole law in existence at the time respondent committed his offense permitted the Parole Board to establish rules and regulations. Ill. Rev. Stat. 1962, ch. 38, §807. The Board enacted regulation 12 allowing them to grant parole to a prisoner as they see fit and to deny parole to one whom they determine is not fit. State of Illinois, Dept. of Public Safety, Parole and Pardon Board, *Rules and Statutes Relating to Parole and Pardon* (October 1962; effective June 1, 1962) (hereinafter cited as *Parole Regulations*). Another regulation the Board enacted was regulation 14 allowing the Board to "consider and evaluate *all factors* in each case, including a prisoner's conduct record." *Id.* (emphasis added). However, there was no provision requiring the Parole Board to state its reasons for denying parole. In fact, prior to 1970, the Board merely stated whether parole had been granted or denied. After 1970 the

Board, on its own, began stating reasons for denial of parole. One such reason was based solely on the seriousness of a prisoner's offense.[2]

In 1973, the Illinois legislature enacted parole guidelines and required for the first time that the Board state its reasons for denial of parole. Ill. Rev. Stat. 1973, ch. 38, §1003-3-5(c); Ill. Rev. Stat. 1973, ch. 38, §1003-3-5(f). Parole was to be denied, if the Board did, in their discretion, find one of the following:

> (1) [T]here is a substantial risk that [the prisoner] will not conform to reasonable conditions of parole; or
>
> (2) his release at that time would deprecate the seriousness of his offense or promote disrespect for the law, or
>
> (3) his release would have a substantially adverse effect on institutional discipline.

Ill. Rev. Stat. 1973, ch. 38, §1003-3-5(c).

In regard to the seriousness of the offense, the Board was required to consider the type of offense as well as aggravating and mitigating circumstances. Prisoner Review Board, *Rules Governing Parole*, 1978 at 6. The new parole guidelines

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[2] The evidence, contained in Appendix E, was *not* before the district court as petitioner-appellee was successful on a motion to dismiss. The court of appeals at first allowed petitioner to supplement the record with this new evidence, however, after a motion for reconsideration, they later returned the evidence and did not consider it.

But see, Theodore P. Fields, *Illinois Parole and Pardon Board Adult Parole Decision*, 62 Ill. B.J. 20, 21 (1973):

> The Statute [Ill. Rev. Stat. 1973, ch. 38, §1003-3-5(c)] sets forth the general criteria for denying parole that have been followed by the Board for some time.

therefore did not impinge on the Board's discretion as the Board was merely required to consider the guidelines prior to making their decision whether to grant or deny parole.[3]

The Seventh Circuit ignored the fact that prior to the enactment of the parole guidelines, the Parole Board had unfettered discretion in denying parole. *Welsh v. Mizell*, 668 F.2d 328 (7th Cir. 1981). In so doing, the court arbitrarily held, rejecting all prior authority, that the second criterion, "that his release at that time would deprecate the seriousness of his offense or promote disrespect for the law" (Ill. Rev. Stat. 1979, ch.38, §1003-3-5(c)), violated the ex post facto clause when applied to the respondent. *Welsh*, 668 F.2d at 332.

The court so held despite the fact that the guidelines merely rationalized the exercise of discretion and excluded from the Board's consideration in denying parole arbitrary, irrelevant factors. Furthermore, there never existed a promise, express or implied, that parole authorities would exercise their discretion in some set fashion. Ill. Rev. Stat. 1961, ch. 38, §801. Under the old unguided parole scheme, respondent could have been denied parole without the Board articulating a reason. Ill. Rev. Stat. 1962, ch. 38, § 807; *See* 62 Ill. B.J. at 20. Also, under the old parole scheme the sentencing judge and the prosecuting attorney were required to furnish the Parole Board with a statement of facts and circumstances surrounding the crime to assist the Board in the exercise of its discretionary authority. Ill. Rev. Stat. 1965, ch. 108, § 203. *Ware v.*

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[3] *Overall v. Director*, No. 74 C 2541 (N.D. Ill. 1974), affirmed without opinion, 513 F.2d 634 (7th Cir. 1975); (Appendix G); *Ware v. Kaufman*, No. 80 C 3209 (N.D. Ill. October 13, 1981) (Appendix H); *Harris v. Irving*, 90 Ill. App. 3d 56, 412 N.E.2d 976 (5th Dist. 1980) (leave to appeal denied January 30, 1981); *People v. Harper*, 27 Ill. App. 3d 406, 327 N.E.2d 91 (5th Dist. 1975) See (F).

Kaufmann, No. 80 C 3209 (N.D. Ill., Oct. 13, 1981) (Appendix H). Therefore, the new parole guidelines did not work a detriment to respondent.

The *Welsh* decision has an impact on a number of states which have enacted parole guidelines which utilize the seriousness of the offense criteria in determining parole.[4] Moreover, it also affects every state that had a parole scheme which allowed unfettered discretion in denying parole and which attempted to articulate guidelines in order to rationalize denials of parole. Such states would be precluded, by the Seventh Circuit's decision in *Welsh*, from correcting their arbitrary statutes, thereby working a detriment to many prisoners.

The effect of the *Welsh* decision in Illinois is that between 300 to 400 prisoners will have to receive new parole hearings.[5] Many of these are individuals whose crimes were so serious that they were originally sentenced to death. *See, e.g., People v. Speck*, 41 Ill. 2d 177, 242 N.E.2d 208 (1968). Yet the Board will be precluded at these hearings from adhering to its traditional

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[4] California Administrative Code Title 15 §2281; Col. Rev. Stat. 1979 §16-11-203(1)(c); General Statutes of North Carolina §15A-1571; New Mexico Ann. ch. 31 §21-19; R.I. Gen. Laws §13-8-14.

[5] Already the following cases are pending in federal district courts in Illinois: *United States ex rel. Mallett v. Warden*, No. 82 C 1295 (N.D. Ill.); *United States ex rel. Butler v. Fairman*, No. 82-2031 (C.D. Ill.); *Graham v. McCombs*, No. 82 C 3100 (N.D. Ill.); *Rodney v. Fairman*, No. 82-2085 (C.D. Ill.); *Heriens v. Mizell*, No. 81-3335 (S.D. Ill.); *Burbank v. Franzen*, 80 C 3325 (N.D. Ill.)

There are also a number of cases being appealed to the Seventh Circuit: *Ware v. Kaufman*, 80 C 3209 (N.D. Ill.); *United States ex rel. Heriens v. Irving*, No. 81-1014 (S.D. Ill.); *Sanders v. Illinois Prisoner Review Board*, No. 81-1235 (S.D. Ill.)

mandate in screening long-term prisoners sentenced for heinous crimes prior to 1973, in that a relevant criterion, the seriousness of the offense, will be excluded from consideration.[6]

The State of Illinois submits that it is absolutely preposterous that a federal court should tell this state that it must grant a parole hearing to a murderer such as Richard Speck without considering the seriousness of his eight murders or to the respondent regardless of his rape and murder of a three-year-old girl. Such an order is beyond the constitutional jurisdiction of a federal court on habeas corpus review, is not dictated by any valid consideration of law, and is offensive to common sense notions of morality.

II.

THE COURT OF APPEALS CONCLUSION THAT THE RESPONDENT COULD NOT HAVE BEEN DENIED PAROLE IN 1962 SOLELY BECAUSE OF THE SERIOUSNESS OF HIS OFFENSE IS INCORRECT, UNFOUNDED, AND CONTRARY TO ALL STATE AND FEDERAL AUTHORITIES WHICH HAVE CONSIDERED THIS ISSUE; IT THEREFORE CONSTITUTES AN UNWARRANTED INTRUSION INTO A STATE'S POWER TO DETERMINE ITS OWN PAROLE STANDARDS.

The present dispute between the State of Illinois and the Seventh Circuit Court of Appeals involves the question of

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[6] *See People v. Lillie*, 79 Ill. App. 2d 174, 223 N.E.2d 718, 719 (5th Dist. 1967) (the nature of the offense is relevant to rehabilitation).

whether the Parole Board denied respondent's parole on the basis of regulations not contained in the parole statute at the time of his crime. Despite the court's contention that, "We hold only that the constraints on the Parole Board's discretion in Welsh's case must be those contained in the statute and regulations that were in effect in 1962, not those subsequently enacted," 668 F.2d at 332, this point has never been disputed by the parties. Illinois denies, however, that respondent's parole was refused on a ground beyond the 1962 parole statute. Thus, the ultimate question involved in this case is: was the respondent's parole denied on the basis of a criterion which could not have supported a parole denial in 1962? Only if this question is answered in the affirmative can the court of appeals' decision be affirmed. If it is answered in the negative, as the Illinois courts have held (see 668 F.2d at 329, citing *Harris v. Irving*, 412 N.E.2d 976), then there can be no prejudice suffered and no question of constitutional violation.

The court of appeals' proof that respondent's parole was unconstitutionally denied may be rendered syllogistically as follows:

> 1. Parole was denied respondent because of "the seriousness of his offense."
>
> 2. The 'seriousness of the offense' criterion could not have resulted in a parole denial under the pre-1973 law.
>
> 3. Therefore, the prisoner was denied parole on the basis of an *ex post facto* law.

Only if each of the first two terms of this syllogism are correct can the Seventh Circuit's decision be affirmed.

The petitioner has no dispute with the first term but contends that the proposition embodied in the second term cannot be accepted. Every Illinois court which has decided this issue

has denied the proposition, and the federal courts have denied this proposition with regard to the analogous federal parole law. *Harris v. Irving, supra*; *Warren v. U.S. Parole Com.*, 659 F.2d 183 (D.C. Cir. 1981), *cert. denied*, 50 L.W. 3669 (February 12, 1982). Indeed, the Seventh Circuit has denied the proposition with respect to both Illinois and federal statutes. *See Overall v. Director*, No. 74 C 2541 (N.D. Ill. 1974), *aff'd without op.*, 513 F.2d 634 (7th Cir. 1975) (See Appendix G); *Garcia v. Parole Board*, 557 F.2d 100 (7th Cir. 1977).

The State of Illinois urges this Court to read the 1962 parole guidelines, quoted *supra*, with this central question in mind: could the Parole Board have denied parole because of the seriousness of the offense? Unless this Court concludes that, as a matter of law, the earlier guidelines did not, under any circumstances, allow the denial of parole for this reason, then the Seventh Circuit has erred and its decision should be reviewed and reversed.

It must first be noted that both the Illinois Constitution of 1870 (in effect from 1962-1970) and the Illinois Constitution of 1970 (in effect at the time respondent's parole was denied) limited the Parole Board. Under the Constitution of 1870, it was required that all penalties be proportioned to the nature of the offense (Art. II, § 11). Similarly, the current Constitution specifically requires that sentences served reflect "the seriousness of the offense." (Art. I, § 11) In light of these constitutional commands, it is incredible that the Seventh Circuit has concluded that the parole guidelines required the Parole Board members to ignore their constitutional duty, by preventing them from ever, under any circumstances, considering the seriousness of the offense.

In support of its rejection of prior case law on point, the court of appeals misstated the holdings of *People v. Moore*, 133 Ill. App.2d 827, 272 N.E.2d 270 (5th Dist. 1971); and *People v. Lillie*, 79 Ill. App. 2d 174, 223 N.E.2d 716 (5th Dist. 1967).

Both of these cases were cited to illustrate the function of parole. However, neither case involved parole. *People v. Moore* involved probation eligibility. 272 N.E.2d at 270. *People v. Lillie* involved probation violations. 223 N.E.2d at 716. Parole and probation are distinct from one another. *Greenholtz v. Inmates of Nebraska Penal Correctional Complex*, 442 U.S. 1 (1979). Their functions are different. *Id.* Indeed, in *People v. Lillie*, the court held *"that past offenses were relevant to the matter of rehabilitation,"* 223 N.E.2d at 719 (emphasis added), which is contrary to the court of appeals decision in *Welsh*. The court of appeals also attempts to prove its argument by means of example. It states that, "at the time of [Welsh's] offense, exemplary conduct during his imprisonment might well have resulted in parole." 668 F.2d at 331. However, the same may certainly be said of the present parole scheme. The Board is not required to give conclusive effect to any one criterion. Also, it is claimed, "Under the later enactment, no evidence of satisfactory rehabilitation can overcome a finding that the nature of his crime makes him a socially undesirable candidate for parole." 668 F.2d at 331. This statement is incorrect and, even if correct, would not advance the argument. The present Board's decision involves a balancing process and "evidence of satisfactory rehabilitation" can "overcome" any other consideration if the Board so decides. Prisoner Review Board, *Rules Governing Prisoners*, 1978 at 6. But, even if correct, it must be noted that the earlier Parole Board was accorded exactly the same discretion to weigh the relevant criteria as it saw fit, and the earlier Board was not required to give any reasons for its action.

The court of appeals states that the purposes of incarceration were served in Illinois in 1962 "when the individual prisoner was deterred from engaging in further criminal activity and his conduct demonstrated his rehabilitation." 668 F.2d at 330. No support is offered for this incredible statement.

One who inquires as to the more fundamental traditional bases of punishment (i.e., retribution and general deterrence), which were constitutionally mandated (Ill. Const. of 1870, Art. II, §11), is met with the court's opinion that "[t]hose factors had already determined the minimum and maximum prison terms imposed by the sentencing judge," and thus "did not enter directly into the Parole Board's decision." 668 F.2d at 330. The court's theory, however, is not and has never been the law in Illinois.

This position cannot be maintained. Application of the court's theory would create clearly undesirable results: for example, by analogy trial courts would be precluded from considering the third factor, potential for rehabilitation, in setting minimum and maximum sentences, though such consideration is clearly mandated by the legislature. Ill. Rev. Stat. 1979, ch. 38, §1005-5-3.1(8)-(10). Also, the legislature has specifically instructed the trial court to consider general deterrence (i.e., "the sentence is necessary to deter others from committing the same crime") in setting minimum and maximum sentences, but the Seventh Circuit decision would not allow this. *See* Ill. Rev. Stat. 1979, ch. 38, § 1005-5-3.2(7).

So it must be seen that the neat compartmentalization of the traditional bases of punishment to different stages of incarceration which the Seventh Circuit finds in the 1962 law is preposterous. Does the Seventh Circuit truly believe that all those who served on the Parole Board before 1973 interpreted the statute's grant of a complete and unfettered discretion as in fact a prohibition on the consideration of retribution and general deterrence? It is very hard to believe that the exercise of such a carefully delimited power was embodied in their two-word decisions: "parole granted" or "parole denied." It is simply absurd that the court of appeals has ordered the Parole Board to return to the loose structure of its former system. This would inflict a detriment on all prisoners.

The theory that retribution and general deterrence should be used by states only to set the upper and lower limits of sentence with specific deterrence and rehabilitation mediating between the two extremes has been advanced by Dean Morris. *See, The Future of Imprisonment* (1974) at ch. 1, 3. But the theory has been rejected by most critics and cannot be said to embody the state of the law in Illinois. In particular, the 1976 Report of the Committee for the Study of Incarceration completely rejected this view. Von Hirsh, *Doing Justice* (1976) at 73-74, 164, n. 18. The Committee specifically noted that, "understating the blame depreciates the values that are involved: disproportionately lenient punishment for murder implies that human life — the victim's life — is not worthy of much concern." *Doing Justice* at 73. Expressions of the traditional, majority views of the purpose of punishment may also be found in H.M. Hart, Jr., "The Aims of the Criminal Law," 23 Law and Contemporary Problems 401 (1958) and H.L.A. Hart, *Punishment and Responsibility* (1968) at ch. 9.

The Seventh Circuit's assumption that the above-outlined theory of punishment expressed the purposes of incarceration in Illinois in 1962 is nothing more than an election between conflicting penalogical theories. While there might be some justification for such an opinion were the Seventh Circuit called on to interpret the federal parole statutes,[7] there is no similar justification for the imposition of such a theory upon the Illinois state penal system. When this federal rewriting of

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[7] But it should be noted that both the Seventh Circuit and the District of Columbia Circuit have concluded otherwise in the federal sphere. See Arguments III and IV, *infra*.

state statutes is accomplished in the face of contrary state court interpretations[9], the result is a complete abrogation of principles of federal-state comity in the guise of constitutional interpretation.

The function of parole in Illinois in 1962 was not simply, as the Seventh Circuit claims, to apply utilitarian notions of deterrence and rehabilitation; it was to see that *all* of the purposes of incarceration were fulfilled. The court of appeals is not a super-legislature which can dictate to Illinois what those purposes were. Where the Illinois courts have stated what the purposes of punishment are, and those purposes and goals are constitutionally permissible, the court of appeals should not be allowed to follow its own theory of the purpose of punishment in Illinois.

The court of appeals view that the seriousness of the offense criterion operates solely for purposes of retribution and general deterence is a gross oversimplification. 668 F.2d at 331. It has long been recognized that the reintegration and rehabilitation of a prisoner into society are goals which are pursued "within general constraints imposed by a duty to protect the public from any potential criminal behavior by the parolee." Comment, "The Parole System," 120 U.Pa. L. Rev. 282, 284 (1971) (hereinafter cited as *Parole*.) At the stage of the parole process at which the Board makes the initial decision of whether or not to grant parole, "the system attempts to identify those prisoners who have the best chance for rehabilitation *and, at the same time, pose the least threat to public safety*". *Parole* at 285 (emphasis added)

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[9] It must be remembered that the Seventh Circuit found jurisdiction to proceed in this case not because the respondent had in fact exhausted his claim in state court, but because the court concluded that "[a]n Illinois appellate court has recently rejected a challenge identical to Welsh's." 668 F.2d at 329.

The seriousness of the offense is relevant to the matter of rehabilitation. *People v. Lillie*, 223 N.E.2d at 719. The court of appeals, in holding that the seriousness of the offense criterion only had the purpose of retribution and general deterrence, neglected to recognize that a major criterion of all parole boards is "the probability of recidivism." *Parole* at 285. Studies have shown that different crimes have varying rates of recidivism. *Id.* Moreover, the Board must also consider the type of crime to gauge the probable impact of repeated criminal behavior on society as a whole. "The danger of a forger returning to his former ways, though more probable than the rapist repeating his crime, is certainly less serious." *Id; See also* Ill. Rev. Stat. 1967, ch. 108, §203 (providing for the circumstances of a crime to be furnished to the Board).

In addition, there is a special deterrence effect. If the Board were required to disregard the severity of the crime as well as the suggested sentence, this would inevitably deprecate the seriousness of the crime in petitioner's eyes and promote disrespect for the law on his part. *See generally* Gibbs, *Crime, Punishment, Deterrence* (1976) at 67.

Because it has been recognized that reintegration and rehabilitation of prisoners into society are goals which are pursued within general constraints imposed by a duty to protect the public from any potential criminal behavior by a parolee, a very relevant criterion in the Board's consideration has always been the seriousness of the offense. *Parole* at 305. *See People v. Lillie*, 223 N.E.2d at 719 (nature of the offense is relevant to rehabilitation.); *Overall v. Director*, No. 74 C 2541 (N.D. Ill. 1974), *aff'd without opinion*, 513 F.2d 634 (7th Cir. 1975); *Harris v. Irving*, 90 Ill. App. 3d 56, 412 N.E.2d 976 (5th Dist. 1980); *People v. Harper*, 27 Ill. App. 3d 406, 327 N.E.2d 91 (5th Dist. 1975); Ill. Rev. Stat. 1967, ch. 108, §203. (See Appendices F, G).

The court of appeals cited a prior chairman of the Board for the proposition that the 'seriousness of the offense' criterion constitutes a marked departure from the prior law. 668 F.2d at 331. The passage which the court excerpts does not prove its point. Indeed, the court ignored the fact that the chairman also stated in regards to the statute involved in the instant case:

> *This statute sets forth the general criteria for denying parole that have been followed by the Board for some time.* 62 Ill. B.J. at 21. (emphasis added)

The court of appeals in rejecting all the cases on point cited *Weaver v. Graham*, 450 U.S. 24 (1981). *Weaver* is clearly distinguishable from the instant case. *Weaver* concerns the expiration date of sentence. In *Weaver* what was in issue was a statute reducing the amount of "gain time" for good conduct. *Id.*

In the instant case what is in issue is the Board's exercise of discretion in the denial of parole. Respondent's eligibility for parole is not in issue. As was stated by the former chairman of the Parole Board:

> Parole eligibility [in Illinois] is not a matter of application but is determined automatically. An offender will be eligible for parole consideration after serving his minimum sentence less credit received for good time.

62 Ill. B.J. at 21.

The issues presented in *Weaver* and in the instant case are distinct from one another. In *Weaver,* the statute in question reduced the number of good time credits that Weaver was automatically entitled to. In the instant case, parole was not automatic. *People v. Kinney*, 30 Ill. 2d 201, 195 N.E.2d 651 (1964); *See* 62 Ill. B.J. at 21. Once respondent became eligible for parole, his parole was subject to the discretion of the Board. *Id.* There has never been anything automatic about

granting parole in Illinois. *Compare* Ill. Rev. Stat. 1962, ch. 38, § 807, *with* Ill. Rev. Stat. 1977, ch. 38, § 1003-3-5(c)(2). Therefore, since all that is in issue in the instant case, is the Parole Board's discretionary denial of respondent's parole, once he was eligible, the court of appeals erred in subjecting the Board's decision to judicial review. *United States ex rel. Cambell v. Pate*, 401 F.2d. 55 (7th Cir. 1968).

In support of its position, the court of appeals cited a number of federal cases arising under the Youth Corrections Act. 668 F.2d at 332. *See Shepard v. Tayler*, 556 F.2d 648 (2d Cir. 1977); *Marshall v. Garrison*, 654 F.2d 440 (4th Cir. 1981); *De Parolta v. Garrison*, 575 F.2d 749 (9th Cir. 1975). However, the court, without citing any authority for its proposition, held that those cases are apposite to the situation presented in the instant case. *Id.* This is simply incorrect. The prior Youth Offenders Act required:

> [A] mental and physical examination, to ascertain his personal traits, his capabilities, pertinent circumstances of his school, family life and previous delinquency or criminal experience, and any mental or physical defects or other factor contributing to his delinquency.

18 U.S.C. § 501.4.

In the long list of criteria provided by the prior statute the severity of the youthful offender's crime was "*conspicuously absent* from the factors that could be observed in determining whether to treat or release him." (emphasis added) *Shepard*, 550 F.2d at 653; *Marshall*, 659 F.2d at 442.

Unlike the Youth Offender Act, the statute involved in the instant case, at the time the respondent committed his offense, did not provide any guidelines. Ill. Rev. Stat. ch. 38, §801 (effective January 1, 1962). The regulations cited by the court of appeals were very general. "The Board shall evaluate all the

factors in each case, including the petitioner's conduct record." *Parole Bd. Rules*, Rule 14. Therefore, it is a misnomer to say, as the Seventh Circuit has, that the severity of the offense was "conspicuously absent" from consideration in the instant case.

The legislative goal in enacting §1003-3-5(c)(2) was not punishment of offenders for its own sake. The Parole Board is not required under the new statute to deny parole to every murderer. Prisoner Review Board, *Rules Governing Parole* (1978) at 6. Rather it was a commendable attempt, similar to the federal parole changes of 1976, to add specific guidelines to the vague charge contained in the prior statute and regulations.[9] It requires the Parole Board to consider all factors in the case in determining a parole applicant's fitness for parole. Ill. Rev. Stat., 1961, ch. 38, §807. The Board, under the new statute, is merely required to consider the seriousness of the offense. Ill. Rev. Stat. 1973, ch. 38, §1003-3-5(c)[10] Furthermore, it was considered by the Board prior to the enactment of the Statute. 62 Ill. B.J. at 21.

In enacting the amended parole provision at issue here, the legislature simply articulated the circumstances under which the Board should deny parole in order to ensure uniformity in the decision-making process. The amended standard is not harsher than the earlier law, but rather, more specific. It announced no criterion which could not have been applied, or

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[9] *See Warren v. United States Parole Commission*, 659 F.2d 183 (D.C. Cir. 1981), *cert. denied* 50 L.W. 3669 (February 22, 1982); *See also Garcia v. U.S. Parole Bd.*, 557 F.2d 100 (7th Cir. 1977) (holding that the United States parole board was entitled to consider offense severity in making parole determinations)

[10] The Board is required to consider the type of crime as well as the aggravating and mitigating circumstances of the crime. Prisoner Review Board, *Rules Governing Parole*, (1978) at 6.

was not in fact applied, under the earlier law. Therefore, application of this standard to respondent did not cause him to suffer *ex post facto* punishment.

Despite the broad scope of the prior law enunciated in the statute itself and in the regulations, the court of appeals, rejecting all prior case law, gave a narrow construction to the focus of the prior parole law. In failing to recognize that recidivism and special deterrence had always been a part of the focus of the Parole Board, the court came to the wrong conclusion. Certiorari is therefore warranted in the instant case where the court of appeals, in an unjustified intrusion into the State's power to determine and interpret its own sentencing and parole standards, disregarded all prior, relevant case law and based its opinion instead upon suspect sociology and its own views of the purposes of punishment in the State of Illinois.

In propounding its own unsupported views as to the nature of parole in Illinois, the court has violated the maxim of statutory interpretation that a "court will interpret statutes whenever possible so as to avoid significant constitutional difficulties." *In re Evans*, 452 F.2d 1239, 1246 (D.C. Cir. 1971); *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288 (1936); *Crowell v. Benson*, 285 U.S. 22, 62 (1932); *See also* C. Sand, *Sutherland on Statutory Construction* § 45.11 (4th ed. 1973). It would have been a simple matter to construe the Illinois provisions, as the Illinois courts have, in a manner consistent with the constitution. In failing to do so, the court of appeals has needlessly intruded into the proper sphere of the state. U.S. Const., Amendment X.

III.

THERE IS A CONFLICT WITH A DECISION OF ANOTHER CIRCUIT

There is a directly analogous *ex post facto* parole guideline case, *Warren v. United States Parole Commission*, 659 F.2d 183 (D.C. Cir. 1981), *cert. denied*, 50 L.W. 3669 (February 22, 1982), which was published after the instant case was decided. Turning back the habeas corpus challenge of a Federal prisoner who alleged that new parole guidelines and use of the "Salient Factor Score" established under the 1976 Parole Commission and Reorganization Act diminished his reparole chances in violation of the *ex post facto* clause, the Circuit Court for the District of Columbia decided that:

> 1) It could not be said that Warren was worse off now than under the old unguided discretion system because *"no one knows what the old Parole Board would have done"* and the present guidelines grew out of traditional board concerns;
>
> 2) Warren's case hardly at all implicates the policies behind the *ex post facto* clause since the guidelines serve the traditional core purposes of the criminal law; and,
>
> 3) Being at the mercy of the Parole Commission was part of the punishment, and the existence of the Commission's discretionary power had not been altered by the new guidelines, even though the manner in which the Commission exercises its discretion has changed.

659 F.2d at 193-196 (emphasis in original).

The Court of Appeals concluded:

> The mere fact that the Parole Commission's mercy is now channeled, structured and rationalized by a formal system of guidelines does not worsen Warren's position. He was sentenced to be held at their discretion. He is being held at their discretion. Such are the wages of crimes.

659 F.2d at 196.

As a matter of policy the court also noted:

> A ruling favorable to the appellant would imply that the guidelines now being used by the Commission are annexed to the sentence of prisoners convicted now and in the future. This would mean that, contrary to the will of Congress, the guidelines could not be altered under a multiplicity of standards applicable to individual convicts depending on the dates of their crimes.
>
> We do not believe the *ex post facto* clause demands such rigid applications.

659 F.2d at 184. In closing its opinion, the *Warren* Court observed that it was joined in its conclusion by all the Circuits, including the Seventh Circuit, that have considered the issue except the Third Circuit. 659 F.2d at 186.[11]

The court of appeals in the present case held that under the old statute seriousness of the offense could not have had decisive weight. 668 F.2d at 331. However, prior to 1973, the Board was not required to state its reasons for denial of parole. Ill. Rev. Stat. 1962, ch. 38, §807. Traditionally, in Illinois, the bases for decision-making have not been revealed by

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[11] *See Geraghty v. United States Parole Commission*, 579 F.2d 238 (3d Cir. 1978), *vacated and remanded on other grounds*, 445 U.S. 388 (1980).

parole boards because of the fear that offenders might use such statements as the basis for opposition or litigation questioning the Board decision. 62 Ill. B.J. at 22. Therefore, no one knows what the Board would have done under the old unguided discretionary system. The District of Columbia Court was frank enough to admit this limitation, even with regard to a federal statute which it is charged to enforce and interpret. *Warren*, 659 F.2d at 193. By contrast, the Seventh Circuit has assumed a position of omniscience. It presumes to tell the State of Illinois precisely what would have occurred under the Illinois law, and it predicates its finding of constitutional violation solely upon such conjecture. Simply put, it is astonishing that the Seventh Circuit is telling a state court what would have necessarily happened under the state statute, while the District of Columbia Circuit frankly admits that, under the fundamentally identical *federal* statute, *"no one knows"* what would have happened. *Warren*, 659 F.2d at 193 (emphasis in original). Such misplaced judicial arrogance is wholly inconsistent with notions of federal-state comity.

Furthermore, there exists no statutory or case authority for the Seventh Circuit's interpretation of Illinois parole law prior to 1973. On the contrary, the authority goes against that court's interpretation. Illinois has always viewed seriousness of the offense to be relevant to rehabilitation. *People v. Lillie*, 79 Ill. App. 2d 174, 223 N.E.2d 716 (5th Dist. 1967). Parole denials based upon the criteria that "release ... would deprecate the seriousness of his offense or promote disrespect for the law" had been utilized by the Board for some time prior to 1973. 62 Ill. B.J. at 21. This criteria is based upon principles that have long existed in the Illinois system of criminal justice. *Id* at 22.

As in *Warren*, the respondent herein was sentenced to the mercy of the Parole Board as part of his punishment. Ill. Rev. Stat. 1962, ch. 38, § 801. The Board's discretionary power has

not been altered by the new guidelines (i.e. the board is not required to automatically deny parole because the respondent committed a murder). Ill. Rev. Stat. 1973, ch. 38, §1003-3-5(c)(2). Rather the Board was required to consider the aggravating as well as mitigating circumstances of the crime. Prisoner Review Board, *Rules Governing Parole*, 1978 at 6.

No promise express or implied was ever held out that the Board would exercise its discretion in some set fashion. Ill. Rev. Stat. 1962, ch. 38, §807. Certiorari is therefore warranted in the instant case because the mere fact that the Parole Board's mercy is now channeled, structured and rationalized by a formal system of guidelines does not constitute an *ex post facto* violation. Respondent was sentenced to the Board's discretion. He is being held at their discretion. "Such are the wages of crime." *Warren*, 659 F.2d at 196.

IV.

THE SEVENTH CIRCUIT, IN VIOLATION OF THE TENTH AMENDMENT, CONDEMNED IN THE STATE SYSTEM OF PAROLE, WHAT IT HAS APPROVED IN THE FEDERAL SYSTEM.

In *Garcia v. United States Board of Parole*, 557 F.2d 100 (7th Cir. 1977), the Seventh Circuit held that the following federal parole guideline "implicitly authorized the Board to consider offense severity in making its parole determinations." The guideline stated:

> If it appears to the Board of Parole from a report by the proper institutional officers or upon application by a prisoner eligible for release on parole, that there is a reasonable probability that such prisoner

> will live and remain at liberty without violating the laws, and if in the opinion of the Board such release is not incompatible with the welfare of society, the Board may in its discretion authorize the release of such prisoner on parole.

18 U.S.C. § 4203(a), quoted in *Garcia*, at 105, n. 5; *cf. Zeidman v. United States Parole Commission*, 593 F.2d 806 (7th Cir. 1979) (noting that "offense severity" may be considered in federal parole hearings).

In the present case, the Seventh Circuit held that the following state parole guideline focused the Illinois Parole Board's inquiry "on the prisoner himself". The severity of the offense committed and society's concern with sufficient punishment "did not enter directly into the Parole Board's decision." 668 F.2d at 330.

> 12. If the members of the Parole and Pardon Board in conference determine that a prisoner serving an indeterminate sentence is entitled to parole, they shall enter an order for parole. If they determine that a prisoner is not a fit person to serve his sentence outside the penitentiary, parole shall be denied. . . .
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> • • •
>
> 14. In its consideration of the question of whether a prisoner should be paroled, the Parole and Pardon Board shall evaluate all the factors in each case, including the prisoner's conduct record, and grant or deny release on parole in accordance with its judgment.

Welsh, 668 F.2d at 330. Moreover, the Seventh Circuit in *Welsh* held that the later state guideline specifically recognizing the seriousness of the offense represented a "marked departure" from the guidelines quoted above and imposed

"for the first time into the parole decision considerations of retributive justice (the relationship between time served and the nature of the offense)." *Welsh*, 668 F.2d at 331.

The two decisions of the Seventh Circuit cannot be reconciled. The Court has condemned in the state system what it had earlier approved in the federal system. The Constitution does not allow for such a two-tiered scheme of justice. Simply stated, the State of Illinois submits that a federal court is without constitutional jurisdiction to condemn in the state sphere what it has approved in the federal system. The Seventh Circuit has already held in *Garcia* that a general parole guideline, even though it may focus on the characteristics of the individual prisoner, nevertheless implicitly authorizes the federal parole board to consider "offense severity". It may not, therefore, construe Illinois' similar general parole guideline to be completely free of any such consideration, particularly where the Illinois courts have repeatedly refused to so construe the provision. *Harris v. Irving*, 90 Ill. App. 3d 56, 412. N.E.2d 976 (5th Dist. 1980).

Moreover, the most recent federal court to specifically address this alleged claim of constitutional violation has similarly found no error. *Warren v. United States Parole Commission*, 659 F.2d 183 (D.C.Cir. 1981). It is a reserved right of the State of Illinois to be free from specially applied constitutional interpretations not generally applicable to the federal government. U.S. Constitution, Amendment X.

CONCLUSION

For the foregoing reasons, the petitioner, as the representative of the People of the State of Illinois, prays that this Court grant the instant Petition for Writ of Certiorari and, upon review, reverse the court of appeals' decision which granted habeas corpus relief to the respondent.

Respectfully submitted,

TYRONE C. FAHNER
Attorney General
State of Illinois

MICHAEL B. WEINSTEIN
DARRELL PANETHIERE

Assistant Attorneys General
188 West Randolph Street
Suite 2200
Chicago, Illinois 60601
(312) 793-2570

Attorneys for Petitioner.

RONALD LEE BELL
Assistant Attorney General

Of Counsel.